LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 15 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1469

HOMART DEVELOPMENT CO.,

Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

LAWRENCE M. COHEN,
LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

ALLEN B. GRESHAM,
LONERGAN, JORDAN, GRESHAM & VARNER,
398 West Fourth Street,
San Bernardino, Calif. 92401,

ROGER J. REITH,
HOMART DEVELOPMENT CO.,
925 S. Homan Avenue,
Chicago, Illinois 60607,
Attorneys for Petitioner.

LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois 60602,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Opinions Below 1

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved.... 3

Statement of the Case..... 4

Reasons for Granting the Writ..... 9

A. The Decision Below Violates Homart's Rights Under the Fifth and Fourteenth Amendments 9

B. The Decision Below Raises an Important Constitutional Question Which Has Not Been, but Should Be, Settled by This Court..... 11

C. The Decision Below Resolves an Important Constitutional Question in a Manner Not in Accord with Applicable Decisions of This Court 14

Conclusion 16

Table of Citations.

Cases.

Adderley v. Florida, 385 U. S. 39 (1966)..... 11

Amalgamated Food Employees v. Logan Valley Plaza, 391 U. S. 308 (1968).....10, 12-13, 14-16

Burnside v. Byars, 363 F. 2d 744 (5th Cir. 1966)..... 11

Cameron v. Johnson, 390 U. S. 611 (1968)..... 11

Carpenters & Joiners Union v. Ritter's Cafe, 315 U. S. 722 (1942) 11

Cox v. Louisiana, 379 U. S. 536 (1965)..... 11

Esteban v. Central Missouri State College, 415 F. 2d 1077 (8th Cir. 1969) 11

Homart Development Co. v. Fein, et al., R. I. Super. Ct. No. 70-275 (Aug. 6, 1970), appeal pending, No. 1174-A, R. I. Sup. Ct., reprinted at Appendix F.... 13

Jones v. Regents of the University of Arizona, ... F. 2d ..... (9th Cir. Dec. 21, 1970) 11

Kovacs v. Cooper, 336 U. S. 77 (1949) 11

Market Street R. R. v. Railroad Commission, 324 U. S. 548 (1944) 2

Marsh v. Alabama, 326 U. S. 501 (1945) 14-16

N. L. R. B. v. Babcock & Wilcox Co., 351 U. S. 105 (1965) 11, 14

Organization for a Better Austin v. Keefe, U. S. Sup. Ct. No. 1484, O. T. 1969 11

People of the State of Illinois v. Sterling, et al., Ill. Cir. Ct. (March 19, 1970), appeal pending, No. 43499, Ill. Sup. Ct. 13

Powe v. Miles, 407 F. 2d 73 (2nd Cir. 1968) 11

Sellers v. Regents of the University of California, 432 F. 2d 493 (9th Cir. 1970) 11

State v. Miller, 280 Minn. 566, 159 N. W. 2d 895 (1968) 13

Sutherland, et al. v. Southcenter Shopping Center, 3 Wash. App. Rep. 833 (No. 13) (1971), appeal pending, No. 41891, Wash. Sup. Ct. 13

Taggart v. Weinacker's, 397 U. S. 223 (1970) 12

Tanner v. Lloyd Corporation, 308 F. Supp. 128 (D. C. Ore. 1970), appeal pending, No. 25605, 9th Cir.....13, 15

Tinker v. Des Moines School Dist., 393 U. S. 503 (1969) 11

Younger v. Harris, ... U. S. ....., 39 U. S. L. W. 4201 (Feb. 23, 1971) 11

Wolin v. Port of New York Authority, 392 F. 2d 83 (2nd Cir. 1968) 11

Women Strike for Peace v. Hickel, 420 F. 2d 597 (D. C. Cir. 1969) 11

Statutes.

United States Constitution:

Article I ..... 3, 9 et seq.
Article V ..... 2, 3, 9 et seq.
Article XIV ..... 3, 9 et seq.

28 U. S. C. § 1257(3) 2

City of San Bernardino, California, Ordinance 2491 .. 3, 7

State of California Penal Code, Section 602(1) 3, 7

Miscellaneous.

Note, 49 Va. L. Rev. 1571 (1963) 15

King, Supermarkets Hub of Suburbs, N. Y. Times (February 7, 1971), at § 1 at p. 58, cols. 4-6 12

Weiss, Shopping Center Malls: The Next Place for Teen-Age Riots, Advertising Age (April 14, 1969), p. 106 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. .....

HOMART DEVELOPMENT CO.,
Petitioner,

vs.

ROGER JON DIAMOND, PEOPLE'S LOBBY, INC., AND WILLIAM DUXLER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Homart Development Co. prays that a writ of certiorari issue to review the opinion, and judgment issued pursuant thereto, of the Supreme Court of California entered in this case on December 16, 1970.

OPINIONS BELOW

The divided opinion of the California Supreme Court is reported as *Diamond, et al.* v. *Bland, et al.*, 3 Cal. 3rd 653, 91 Cal. Rptr. 501, 477 P. 2d 733 (1970), and is printed at Appendix B, pp. A4-A21. The opinion of the California Court of Appeal, Fourth Appellate District, is reported under the same name at 8 Cal. App. 3rd 58, 87 Cal. Rptr.

97 (1970), and is printed at Appendix C, pp. A22-A43. The oral opinion of the California Superior Court for the County of San Bernardino is unreported and is printed at Appendix D, pp. A44-A48.

JURISDICTION

The opinion of the California Supreme Court was filed on December 16, 1970. Appendix B, pp. A4-A21. A motion for a stay of remittitur was denied by that court by order dated January 14, 1971. Appendices E-1, E-2 and E-3, pp. A49-A57. Judgment was thereafter entered by the California Superior Court on February 1, 1971 and its execution stayed to permit the filing and disposition of this Petition. Appendices E-4, E-5 and E-6, pp. A58-A63. This Court has jurisdiction under 28 U. S. C. § 1257(3).[1]

QUESTION PRESENTED

May the owner of a shopping center be compelled, in derogation of his Fifth Amendment property rights, to have part of his private commercial property confiscated for the use of those who wish to engage in any free speech activities thereon notwithstanding that (1) the activities are unrelated to any business of the center and (2) there are effective alternative locations in which to engage in such activities?

1. The judgment is a final one for purposes of review by this Court. *Market Street R. R. Co.* v. *Railroad Commission,* 324 U. S. 548, 551-2 (1944).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First, Fifth and Fourteenth Amendments to the United States Constitution, as well as indirectly Section 602(1) of the California Penal Code and Ordinance 2941 of the City of San Bernardino, all of which are set out in Appendix A, pp. A1-A3.

STATEMENT OF THE CASE

Homart Development Co. (hereafter "Homart") is the owner of shopping centers throughout the United States including one located at San Bernardino, California called the Inland Center. Respondents are People's Lobby, Inc., a non-profit California corporation engaged in a continuing process of securing signatures on varied initiative petitions and related activities; Roger Jon Diamond, its attorney; and William Duxler, a volunteer worker for People's Lobby on its initiative campaigns. Appendix B, pp. A4-A5; Appendix C, p. A23.

Inland Center is a private shopping center.[2] Homart has made a substantial, continuing investment in the Center in order to attract potential customers to, and encourage them to do business with, the establishments maintained there. The Center represents a capital investment by Homart of approximately $7,000,000. There is a large parking area provided for customers only and a totally covered, bi-level shopping mall containing three major department stores and seventy-two tenant stores. A continuous expenditure is required for advertising, an extensive inventory of quality merchandise and business promotions and displays to induce prospective customers to come to the Center. A considerable investment is also

2. The Center is clearly marked and preserved as private property. Each night, for example, the interior mall area is locked and access denied the public. The Center is also surrounded with a chain-link fence and all the entrances thereto are posted with a sign indicating that the area is private property and that admission is subject to revocation. C. T. 76-7 (References to "R. T." and "C. T." are to the Reporter's Transcript and the Clerk's Transcript, respectively, of the proceedings in the California Superior Court).

necessary so that, once having been attracted to the Center, potential purchasers will fully utilize its various shopping facilities; the Center must be considered as a pleasant, conducive place to shop without disruption and interference. It is for this reason that the mall area is designed to be virtually indistinguishable from the selling areas of the stores[3] and shoppers there provided with controlled temperatures, piped-in music, restroom facilities and benches and receptacles placed on an attractive thirty-two foot wide, carpeted common aisleway. It is for this reason also that Homart and the tenant stores expend over $165,000 annually to provide the varied services, such as security, maintenance, insurance, utilities, air conditioning, taxes and licenses, and so on, necessary to operate the common areas of the Center. Appendix B, p. A5; Appendix C, p. A24; R. T. 86, 103-104.

Since the sole purpose of Homart's substantial investment in Inland Center is to obtain and preserve the patronage of the public, all activity on Center premises which does not directly promote its commercial purposes is forbidden. This prohibition is one which applies with equal force to both Homart, its tenants and strangers alike.[4] The restriction is one enforced nationally by Homart without discrimination. Non-commercial conduct is barred because it would unavoidably disrupt and distract shoppers, and appropriate their limited purchasing time, with matters unrelated to Center business. It would both burden the

3. The tenant stores have an obstructed frontage on, and their displays and merchandise are easily visible from, the mall common aisleways. There are also three kiosks, or leased mall sales booths, actually located in the middle of the aisleways. Appendix B, p. A5; Appendix C, p. A24, C. T. 74-5.

4. As a specific condition of the tenant agreements with Homart, under which Homart receives a percentage of the tenant sales, it is agreed that all non-promotional activity on the mall common areas is prohibited. This condition is strictly enforced. C. T. 81; R. T. 99, 102-303.

facilities of the Center and detract from its sales. As a result, although Inland Center is besieged with many calls each week from various worthwhile (and not so worthwhile) religious, charitable, commercial and political groups seeking to use the Center for a multitude of personal reasons, all such conduct has been uniformly prohibited on Center property. Appendix B, p. A5, Appendix C, pp. A24-A25.[5]

Accordingly, when Respondents sought to use the facilities of the Center to solicit signatures and disseminate information with respect to two anti-pollution initiative petitions, their request was denied. Such a use involved no dispute with, nor was designed to benefit, either Homart or its tenants. The Respondents' objective was one which admittedly could have been achieved through numerous alternative means and at numerous other effective locations.[6]

---

5. The desired uses range from political candidates such as the late Senator Kennedy, Senator Tunney, and Governor Reagan to geranium sellers, vacuum cleaner demonstrators and individuals collecting money for themselves or organizations they do not actually represent. The prohibited activities include those sought by tenants such as Sears, Roebuck and Co., churches, fraternal groups, environmental organizations, the Army, the United Fund, the Salvation Army and others "wishing to do everything that you can virtually imagine". C. T. 81-2, R. T. 99-102, 109-110.

6. Solicitation of signatures could have been engaged in on the abundant public sidewalks, public parks and other public facilities readily available in the San Bernardino area as well as at public affairs such as parades. Other potential arenas which admittedly were available included the exterior of local businesses, houses of worship, entertainment centers, sporting events and military installations. Communication with the public could also have been obtained through newspapers, radio and television, telephone, door-to-door contacts, bumper stickers and mailings. In some instances these alternatives were too expensive or inconvenient for Respondents; Respondents utilized other alternatives effectively; in further cases arrangements were just being made to utilize such tactics; and, in still other cases, there was no attempt made by Respondents to capitalize on such possibilities. Appendix B, p. A14; Appendix C, pp. A26-A29; C. T. 83; R. T. 13, 16-22, 26-28, 127-131.

Nevertheless, on October 30, 1969, during one of the more congested periods at Inland Center, Duxler and several other individuals representing People's Lobby set up a card table in the enclosed mall area of the Center. There they proceeded to solicit signatures, distribute information, pass out bumper stickers, collect donations and affix a sign describing their purpose to the Center directory. A crowd of shoppers, diverted from their shopping, soon congregated. The crowd attracted the attention of one of Homart's security officers who requested that such activities cease. Duxler and the others then took down their card table and left the mall area, only to resume such activities on the exterior sidewalk. Again, the security officer requested that they leave and this time they did. If there had not been compliance with the requests to leave, police assistance would have been sought pursuant to San Bernardino Ordinance 2941[7] and the California Penal Code trespass provision.[8] Appendix B, pp. A6, A7; Appendix C, pp. A25-A27.

Respondents thereafter filed a complaint for injunctive relief and prayer for declaratory relief against Homart, its agents and various San Bernardino city and county officials alleging that the refusal to permit the use of Center premises was in violation of their constitutional rights. The California Superior Court denied a request for a temporary restraining order and, after a full hearing,

7. San Bernardino Ordinance 2941 (Appendix A, pp. A2-A3) provides that "for the immediate preservation of the public peace, health and safety" and to regulate "the congregating and loitering on the malls, parking lots and open areas of . . . shopping centers and business premises", it is a misdemeanor for a private person to enter or remain upon such premises without the consent of the owner thereof.

8. California Penal Code Section 602(1) (Appendix A, p. A1) provides that a trespass includes "[e]ntering and occupying real property or structures of any kind without the consent of the owner, his agent, or the person in lawful possession thereof."

judgment was entered denying both preliminary and permanent injunctions. This judgment was affirmed by a unanimous California Court of Appeal, Fourth Appellate District, and then, in turn, reversed by a divided California Supreme Court. Both courts recognized that the case presented "a constitutional question of first impression" (Appendix B, p. A4; Appendix C, p. A23) and, accordingly, issued thorough, carefully-considered opinions.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Violates Homart's Rights Under the Fifth and Fourteenth Amendments

The State has violated Homart's Fifth and Fourteenth Amendment rights by appropriating part of its property without compensation. The decision below compels Homart, the owner of a private shopping center, to permit the exercise of *any* free speech activities on its specially developed and expensively maintained commercial property. Such activities must be tolerated notwithstanding that they may have no connection whatsoever with the views of the center's owner or occupants or with the conduct of their businesses. Homart is thus required to provide, free of charge, its valuable facilities to be utilized in a manner that will distract and even drive away those very customers it has attracted to Inland Center. Homart is obligated, in effect, to subsidize a competing use of its property.

The public comes to Inland Center because of the substantial investment that has been made to gain and retain its patronage. The patrons have been led to believe, through the expenditure of considerable money and effort, that the Center is a comfortable and convenient place to do business. They have a limited amount of shopping time available. If, upon entry, such prospective customers are enticed to devote their restricted purchasing time to a variety of controversial competing uses, there will clearly be a serious adverse effect on the normal sales activities of the Center. It is for this very reason that even the tenant stores, apart from the kiosks which pay for the privilege, have been prohibited from utilizing the common aisleways of the mall for their own purposes. To now appropriate

Homart's property for the unrelated activities of others is truly "to create a court-made law wholly disregarding the constitutional basis on which private ownership of property rests in this country." *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U. S. 308, 333 (Black, J., dissenting).

This substantial deprivation of Homart's rights is one that cannot be obviated by "reasonable regulations". Indeed, the problem of devising any such regulations is one which "assumes epic proportions . . . [and] presents to the owners of shopping center policing problems of staggering proportions". Appendix C, p. A42. The shopping center owner would, for example, be required to assume the recognized responsibilities of a well-trained and equipped governmental body: to determine and enforce the appropriate time, place and nature of an enormous volume of desired uses; to provide the attendant maintenance and security services free of charge; and to assume the risk of any potential disruption or damage liability. And he would be required to assume these obligations, and the concomitant loss of business that would result from permitting competing uses, even though there may be no means by which he can, through his own actions, remove the communicants' source of discontent. Homart here cannot agree, for example, to any picketing union's demands, remove any offending merchandise, or engage in any other requested action to terminate Respondents' desired activities. Instead, it must suffer the substantial and expensive burdens imposed by that use as long as the Respondents choose Inland Center as a desirable place to communicate their message.

Such a significant State confiscation of Homart's property raises an important issue which warrants review by this Court.

B. The Decision Below Raises an Important Constitutional Question Which Has Not Been, but Should Be, Settled by This Court

This Court has "vigorously and forthrightly rejected" the concept that those "who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[9] The Respondents have no constitutional right to require that Homart furnish them with a place to engage in their activities.

The desire to use private shopping center property for *unrelated* competing activities is one which, as here, occurs with almost daily frequency and variety. This is a situation far different from that arising from the use of such property for related activities. In today's prevailing social climate there is an expanding desire to propagandize an infinite variety of political, social, religious, commercial, charitable and economic ideas. Evidence of this phenomena can be found, for example, in the recent litigation involving the exercise of various First Amendment activities at locations other than shopping centers.[10] The attractiveness of private shopping centers, regardless of their shape or

9. *Adderley* v. *Florida*, 385 U. S. 39, 48 (1966), citing *Cox* v. *Louisiana*, 379 U. S. 536, 559 (1965). See also *Younger* v. *Harris*, ... U. S. ...., 39 U. S. L. W. 4201, 4205 (Feb. 23, 1971); *Cameron* v. *Johnson*, 390 U. S. 611 (1968); *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1965); *Kovacs* v. *Cooper*, 336 U. S. 77 (1949); and *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U. S. 722 (1942).

10. See, *e.g.*, *Organization for a Better Austin* v. *Keefe*, No. 1484, O. T. 1969; *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969); *Jones* v. *Regents of the University of Arizona*, ... F. 2d .... (9th Cir. Dec. 21, 1970); *Sellers* v. *Regents of the University of California*, 432 F. 2d 493 (9th Cir. 1970); *Women Strike for Peace* v. *Hickel*, 420 F. 2d 597 (D. C. Cir. 1969); *Esteban* v. *Central Missouri State College*, 415 F. 2d 1077 (8th Cir 1969); *Powe* v. *Miles*, 407 F. 2d 73 (2nd Cir. 1968); *Wolin* v. *Port of New York Authority*, 392 F. 2d 83 (2nd Cir. 1968); and *Burnside* v. *Byars*, 363 F. 2d 744 (5th Cir. 1966).

size, as a place of communication, both peaceful and otherwise, is apparent.[11] If Inland Center must be made available to Respondents for their desired use, others will obviously have the same right to appropriate such property either to disagree with Respondents or for a wide spectrum of other personal reasons.

The instant case presents a far different question from that involved in *Logan Valley* and *Taggart* v. *Weinacker's*, 397 U. S. 223 (1970).[12] The objective of the use sought here was not to protest or criticize any of the owners or tenants of Inland Center but rather to solicit signatures on a totally unrelated petition; the primary location chosen by Respondents was not the exterior sidewalk surrounding the Center mall but rather the common mall aisleways which are an integral part of and virtually indistinguishable from the actual selling areas; and, finally, here there was no resultant limitation on the effective expression of Respondents' message but rather an availability of a wide variety of alternative forums for reaching the desired audience. The present case thus raises directly the question, specifically left undecided in *Logan Valley*, of whether a shopping center owner's "property rights, could, consistently with the First Amendment justify a bar on [communication] . . .

11. See, *e.g.*, Weiss, *Shopping Center Malls; The Next Place for Teen-Age Riots*, Advertising Age, April 14, 1969, p. 106, and King, *Supermarkets Hub of Suburbs*, N. Y. Times, Feb. 7, 1971, § 1 at p. 58, cols. 4-6.

12. *Taggart* differed from *Logan Valley* in the physical nature of the situs (a small, congested single retail store as opposed to a large regional shopping center) rather than, as here, in a different objective of the communication desired and in an admitted availability of alternative forums. It was because of this related, but nevertheless separate, nature of the issues involved that Homart submitted a brief *amicus curiae* in *Taggart* so that "the Court should be aware of the pendency of the [instant] proceeding and not dispose of the different questions [here] involved." Motion and Brief of Homart Development Co. as *amicus curiae* in *Taggart* v. *Weinacker's*, No. 74, O. T. 1969, pp. 2, 6.

which was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U. S. at 320, fn. 9.

The unresolved nature of the important and sensitive question here presented has resulted in considerable litigation throughout the nation. The same issue is now pending before at least one United States Court of Appeals and the highest court of three states.[13] Such controversy, unless alleviated by this Court, is surely likely to continue. The question presented is, as the American Civil Liberties Union stated in its *amicus* brief to the court below, "one of general interest and importance to all the public". The present case is an appropriate vehicle to resolve this important issue.[14]

---

13. *Tanner* v. *Lloyd Corporation,* 308 F. Supp. 128 (D. Ore. 1970), *appeal pending,* No. 25605, 9th Cir.; *Homart Development Co.* v. *Fein, et al.,* R. I. Super. Ct. No. 75-275 (Aug. 6, 1970), *appeal pending,* No. 1174-A, R. I. Sup. Ct., reprinted at Appendix F; *People of the State of Ill.* v. *Sterling,* Ill. Cir. Ct. (March 19, 1970), *appeal pending,* No. 43499, Ill. Sup. Ct.; and *Sutherland, et al.* v. *Southcenter Shopping Center,* 3 Wash. App. Rep. 833 (No. 13) (1971), *appeal pending,* No. 41891, Wash. Sup. Ct. In *Tanner* and *Sutherland,* the lower courts decided that shopping centers could not bar the Vietnam War demonstrators and environmental petition solicitors, who, respectively, were there involved. An opposite conclusion was reached by the lower courts in *Homart* and *People* v. *Sterling* permitting the shopping centers in those cases to bar, respectively, political candidates and S.D.S. protestors. See also *State* v. *Miller,* 280 Minn. 566, 159 N. W. 2d 895 (1968), where the Minnesota Supreme Court, in a three line *per curiam* decision, reversed the trespass conviction of certain persons who had entered upon a shopping center to distribute political pamphlets holding, without explanation, that *Logan Valley* was dispositive.

14. The dispute involved here is a viable and continuing one. For example, on December 21, 1970, Respondents evidenced their desire to conduct a variety of activities at Inland Center "as soon as the remittitur issues . . ." Appendix E-1, pp. A52-53. Again, on January 7, 1971, their attorney declared his intent "to take advantage of [the California Supreme] Court's ruling" through the exercise of various "initiative petitions in the future, as well as . . . other kinds of activities." Appendix E-2, p. A55. See also Appendix B, pp. A7-A8; Appendix C, pp. A27-A29.

C. The Decision Below Resolves an Important Constitutional Question in a Manner Not in Accord with Applicable Decisions of This Court

The decision below presupposes that private shopping centers have become so impregnated with a public character that they must be treated as the equivalent of public property for *all* First Amendment purposes. It is founded upon the belief that, since the modern shopping center is the functional equivalent of a business district, it must be considered the exact counterpart of a public street or park. The cases upon which this novel and far-reaching constitutional concept is predicated, *Logan Valley* and *Marsh* v. *Alabama*, 326 U. S. 501 (1945), stand for no such proposition. Neither case requires that private property be equated with public property where there are effective alternative means of communication available.

In *Logan Valley*, a shopping center was precluded from barring a labor union from protesting the labor policies of a particular store located in the center. The rationale of the decision was that to uphold such a prohibition would immunize the shopping center and its tenants from "on-the-spot public criticism" and from "protected expression regarding their business." 391 U. S. at 324-5, 326. The crux of the decision was the absence of any other point of persuasion. Cf. *N. L. R. B.* v. *Babcock & Wilcox Co.*, 351 U. S. 105 (1965). Free expression and communication would have been defeated *altogether* if the use sought in that case had not been permitted. The decision in *Logan Valley* was, accordingly, one expressly limited to the related purpose there involved. 391 U. S. at 319-20.

Similarly, in *Marsh*, as Mr. Justice Black, the author of that opinion, makes clear in his dissenting opinion in *Logan Valley*, the private town there involved had taken

on *all* of the attributes of any American town. The property owner's total prohibition of expression, therefore, banned the exercise of First Amendment rights through *all* channels of communication. 391 U. S. at 332. However, the shopping center is functionally and authoritatively a far different entity from the company town. As one observer noted: "Noone spends his whole life within a shopping center as he well might do within a company town. People enter and leave a shopping center freely . . . the owners of a shopping center do not have the same power and influence over the lives and thoughts of its customers as the owners of a company town have over its inhabitants." Note, 49 Va. L. Rev. 1571, 1577 (1963).

The decision of the California Supreme Court in this case extends *Logan Valley* and *Marsh* into a considerably different arena where the interests involved are of a totally different order. It intrudes into an area where there is no basis for confiscating private property. A shopping center is not, as the court below presumes (Appendix B, pp. A9, A11), required by *Marsh* to be the precise equivalent of public property for *all* First Amendment purposes. And the crucial distinction between the use sought in *Logan Valley* and that desired in this case—the availability of alternative forums of expression—is one which not only makes the nature of the communication here "less compelling" (Appendix B, p. A16) but actually dictates a different result. The principal error of the court below is expressly the same as that of the District Court in *Tanner*. It is the presumption that a property owner "who opens his land to the general public . . . gives up the right to prohibit the distribution of literature . . .", or, for that matter, to prohibit any free speech activities whatsoever on his private commercial property. Appendix B, p. A12, quoting 308 F. Supp. at 132.

The decision below engages in a fundamental and dangerous misreading of *Marsh* and *Logan Valley*. This Court has never sanctioned the substantial deprivation of Homart's Fifth and Fourteenth Amendment now countenanced by the decision of the California Supreme Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE M. COHEN,
LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois 60602,

ALLEN B. GRESHAM,
LONERGAN, JORDAN, GRESHAM
& VARNER,
398 West Fourth Street,
San Bernardino, Calif. 92401,

ROGER J. REITH,
HOMART DEVELOPMENT CO.
925 South Homan Avenue,
Chicago, Illinois 60607,
Attorneys for Petitioner.

LEDERER, FOX AND GROVE,
111 West Washington Street,
Chicago, Illinois 60602,
Of Counsel.